

In the Supreme Court
OF THE
United States

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OCTOBER TERM, 1943

No. 120

OLAF OSWALD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

to Be Directed to the United States Circuit Court of Appeals
For the Ninth Circuit to Bring Before This Honorable Court the
Case of United States of America, Petitioner v. Honorable
Delbert E. Metzger, Judge of the United States District Court
For the Territory of Hawaii, and Olaf Oswald, Reporter of
Said Court, Respondents, and Numbered Therein No. 10,291

and

BRIEF IN SUPPORT THEREOF.

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Said Court, Respondents, and Numbered Therein No. 10,291.

*To the Honorable Harlan Fiske Stone, Chief Justice
of the United States, and to the Associate Justices
of the Supreme Court of the United States:*

The petitioner above named hereby petitions this
Honorable Court for a Writ of Certiorari to be di-

rected to the United States Circuit Court of Appeals for the Ninth Circuit to bring before this Honorable Court the case pending therein entitled: "United States of America, Petitioner v. Honorable Delbert E. Metzger, Judge of the United States District Court for the Territory of Hawaii, and Olaf Oswald, Reporter of said Court, Respondents, No. 10,291", and in support of said petition respectfully shows that:

I.

OPINION OF THE COURT BELOW.

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit is printed in full at pages 35-38 of the transcript of record herein to which reference is hereby made.

II.

SUMMARY OF THE MATTER INVOLVED.

Petitioner is the official reporter of the United States District Court for the Territory of Hawaii and has been such since November 1, 1931 (Tr. 32).

The United States of America, plaintiff in a certain proceeding in eminent domain, tried before said Court, filed in said Court a motion for an order requiring petitioner to furnish a transcript of said proceedings in accordance with Rule 129 of the rules of said Court (Tr. 15-16). Said rule defining the duties and compensation of the Court's reporter in addition to salary allowed by law had existed in said Court in substance

for over forty years (Tr. 31). The rule was amended to its present form on March 26, 1934 (Tr. 33) and subsequent to the effective date of the Rules of Civil Procedure prescribed by the Supreme Court of the United States in the District Court of Hawaii, the judges of that district re-examined said Rule 129 of that Court in connection with said Rules of Civil Procedure and determined that said rule was lawful, fit and proper and should continue without change (Tr. 31).

The District Court in response to said motion made its order granting the motion directing the preparation of the transcript in accordance with the provisions of said Rule 129, to-wit, when and after satisfactory arrangements were made with the petitioner, or he was paid in advance the sum provided by the rule (Tr. 17).

The United States of America, plaintiff, in said eminent domain proceeding thereupon sought a writ of mandate from the United States Circuit Court of Appeals for the Ninth Circuit, compelling the district judge to order petitioner to furnish and compelling petitioner to furnish the transcript without additional compensation provided for by said rule and order of the District Court (Tr. 3-5).

The United States Circuit Court of Appeals for the Ninth Circuit declined to grant the writ against the district judge, but granted the writ as prayed for against petitioner (Tr. 38).

III.

JURISDICTION.

The writ was issued against petitioner January 9, 1943. Petitioner's petition for rehearing was denied by the United States Circuit Court of Appeals for the Ninth Circuit on April 5, 1943. Enforcement of the writ has been stayed until after this Court shall have disposed of this petition (Tr. 45).

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended (28 U.S.C.A. 347).

IV.

STATUTES AND FEDERAL CONSTITUTIONAL PROVISIONS INVOLVED.

31 Stat. 158, as amended, 48 U.S.C.A. 644;
Revised Statutes 1765, U.S.C. Section 70;
The Act of Congress of June 19, 1934, 48 Stat.
1064, 28 U.S.C.A. 723b;
Constitution of the United States, 5th Amend-
ment.

V.

QUESTIONS PRESENTED.

(1) Do the Rules of Civil Procedure prescribed by the Supreme Court of the United States pursuant to the Act of Congress of June 19, 1934, control over earlier statutes in conflict therewith, and provide a

general uniform procedure in all the District Courts of the United States?

(2) Can an officer of the District Court of the United States be compelled to furnish to the Executive Branch of the Government, without just compensation, additional services to those required by the terms of his existing employment?

VI.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT OF CERTIORARI.

The issues are simple but the general importance of the questions involved are apparent from their mere statement.

The questions here involved affect the uniformity of the procedure sought to be established by the Rules of Civil Procedure prescribed by the Supreme Court of the United States pursuant to the Act of Congress of June 19, 1934, and the constitutional guarantee provided by the 5th Amendment of the Constitution of the United States.

**BRIEF IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI.**

- I. **THE LAW OF THE CASE IS THE ACT OF CONGRESS OF JUNE 19, 1934 AND RULE 80 OF THE RULES OF CIVIL PROCEDURE PRESCRIBED BY THIS COURT THEREUNDER AND NOT R. S. 1765 AND 31 STAT. 158.**

The decision of the Circuit Court of Appeals rests upon the proposition that because R. S. 1765 prohibits a public officer from receiving additional pay or compensation, a court reporter of the District Court of Hawaii, originally appointed under 31 Stat. 158, can be compelled to furnish free transcripts to the United States, as a litigant in a civil case.

The Court holds this to be so even though the long established rule of the Court in which petitioner serves and has served for many years provide he shall be paid.

R. S. 1765, U.S.C. 70, provides:

“No officer in any branch of the public service, or any other person whose salary, pay or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or any other service or duty whatever, unless the same is authorized by law, and the appropriation therefor explicitly states that it is for such additional pay, extra allowance or compensation.”

The decision of the Circuit Court of Appeals ignores the fact that Rule 80 of the Federal Rules of Civil Procedure prescribed by this Honorable Court provides that the compensation of official court reporters

shall be fixed by the District Court in which such reporter serves and that said Rule 80 has itself the force of a statute.

Section (b) of said Rule 80 provides as follows:

“(b) *Official Stenographers.* Each district court may designate one or more *official court stenographers* for the district and *fix by rule of court the compensation which such stenographers shall be entitled to charge for their services*, with provision that amounts properly paid by parties for the service of such stenographers be taxable as costs in the case in *the discretion of the trial judge*. The work of the stenographers shall be so arranged as to avoid delay in furnishing transcripts ordered for the purposes of motions for new trial, for amended findings, or for appeals.” (Italics ours.)

Pursuant to said rule 80 the District Court which designated petitioner its official reporter has fixed by Rule 129 of that Court the compensation its reporter is entitled to charge for his services. Said Rule 129 is set forth in full at page 18 of the transcript herein as follows:

“The official court reporter shall report and keep a record of all actions and proceedings tried and held before this court. The compensation of the official court reporter shall, *in addition to his salary provided by law*, be \$10 per day and \$5 per half day for reporting in civil cases, and *twenty cents per folio for transcribing his notes, to be paid by the party requiring the transcript*. The per diem expenses in such cases shall be paid by the parties, in advance, excepting the United

States, and shall be taxable as costs in the case. *When the court shall require* a transcript of the reporter's notes in civil cases, the charge therefor shall be paid by the parties, excepting the United States and shall be taxable as costs in the case. When the court shall require a transcript of the reporter's notes in any criminal action or proceeding, such transcript shall be furnished free of charge." (Italics ours.)

Rule 129 of the U. S. Dist. Ct. for the Territory
of Hawaii as amended March 26, 1934.

The decision of the Circuit Court of Appeals regards Rule 80 prescribed by this Honorable Court as well as said Rule 129 as mere rules of Court which must yield to the force of a statute. This conclusion ignores the fact that said Rule 80 under authority of which said Rule 129 is prescribed not only has itself the force and effect of a statute but the statute giving it such force and effect expressly repeals all other laws in conflict with said rule.

Section 1 of the Act of Congress of June 19, 1934, 48 Stat. 1064, 28 U.S.C.A. § 723b, provides:

"Rules in actions at law; Supreme Court authorized to make. The Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. They shall take effect six months

after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect. June 19, 1934." (Italics ours.)

As provided in this section, the Federal Rules of Civil Procedure are general rules for all the District Courts of the United States. Their whole purpose is to provide uniformity of procedure in all the District Courts so that there will not be one rule for the District of California and another for the District of Hawaii.

To insure this uniformity the Congress expressly provided that "thereafter all laws in conflict therewith shall be of no force or effect". Petitioner therefore submits that if there be a conflict between the Act creating the position of reporter of the United States District Court of Hawaii (48 U.S.C.A. Sec. 664) or R. S. 1765 upon which the decision of the Circuit Court of Appeals is bottomed, then said statutes are to that extent repealed and the law of the case is said Rule 80 prescribed by this Honorable Court and said Rule 129 authorized thereunder.

II. THE DECISION OF THE CIRCUIT COURT OF APPEALS DEPRIVES PETITIONER OF HIS PROPERTY WITHOUT JUST COMPENSATION IN VIOLATION OF THE RIGHTS GUARANTEED HIM BY THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

"nor (shall any person) be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use,

without just compensation." (5th Amend. Const. of the U.S.)

The Constitution makes no distinction between real and personal property (*Heflebower v. U. S.*, 21 Ct. Cl. 228 at 237).

A reporter's transcript is the private property of the reporter who has transcribed it from his notes. It is the subject of contract and a thing of value for which he is entitled to be paid. The preparation of a transcript involves time and labor which is usually the reporter's free time outside of Court sessions and after ordinary working hours.

The decision of the Circuit Court of Appeals denies petitioner any compensation for the *additional* time and labor involved in producing this transcript and by writ of mandate compels him to produce it. He cannot be compelled to produce it where it is not, as appears hereinafter, a part of the duties of his office to furnish free transcripts to litigants in civil cases.

Nor can he be compelled to produce it simply because the Executive Branch of the Government has failed to obtain from the Congress a proper appropriation out of which he can be paid.

"No man can be compelled to give his time and labor, any more than his tangible property, to the public without compensation; and, since there is no mode by which policemen appointed by the commissioners can be compensated, it follows that no one, even after accepting their appointment, can be compelled to perform any police duties."

Hinze v. People ex rel., 92 Ill. 406, 424.

III. WHETHER PETITIONER BE AN OFFICER OF THE UNITED STATES OR NOT HIS DUTIES DO NOT REQUIRE HIM TO FURNISH FREE TRANSCRIPTS TO ANY LITIGANT, INCLUDING THE UNITED STATES.

The decision of the Circuit Court of Appeals holds petitioner to be an officer of the United States under the Act of Congress creating the position of reporter in the United States District Court for the Territory of Hawaii and granting that Court authority to make the appointment (*Oswald v. United States*, 96 Fed. (2d) 10).

That Act, 48 U.S.C.A. 644, provides in part as follows:

“The said district judges shall appoint a reporter of said court at a salary of \$1,200.00 per annum.”*

The Act is silent as to the duties of such reporter. While denying the validity of Rule 129 of the District Court of Hawaii in reference to compensation, the Circuit Court of Appeals relies perforce upon that rule for a definition of these duties. The Court then goes on to place its own interpretation upon these duties as follows:

“* * * The duties of the official reporter are set forth in rule 129 of the lower court. The official reporter is required to report and keep a record of all actions and proceedings and to furnish transcripts of testimony where required, either by the parties or by the court. If he were not required

*Subsequently changed from time to time until the present when the classification calls for a salary of \$2,600.00 per annum (*Oswald v. U. S.*, *supra*).

to furnish transcripts of testimony, there would be no purpose in having a reporter; the notes must be read or transcribed at some time to be of any value at all. The purpose of having a stenographer report proceedings in the trial of a case is to make available a transcript of the testimony whenever required. It follows, as a matter of course, that the furnishing of transcripts of testimony is an ordinary duty of an official stenographic reporter and such services rendered by him are 'official services'."

Oswald v. U. S., 96 Fed. (2d) 10, 13.

Granting that the purpose of having a stenographer report proceedings in the trial of a case is to make available a transcript of the testimony if and when called for later, it does not follow that therefore anybody other than the Court is entitled to demand free transcripts.

The only official duty of the reporter under said Rule 129 to furnish free transcript in civil cases is when required to do so *by the Court* for the use of the Court which he serves.

Dated, San Francisco, California,

June 24, 1943.

Respectfully submitted,

JOHN K. HAGOPIAN,

Attorney for Petitioner.

WILLIAM A. O'BRIEN,

Of Counsel.



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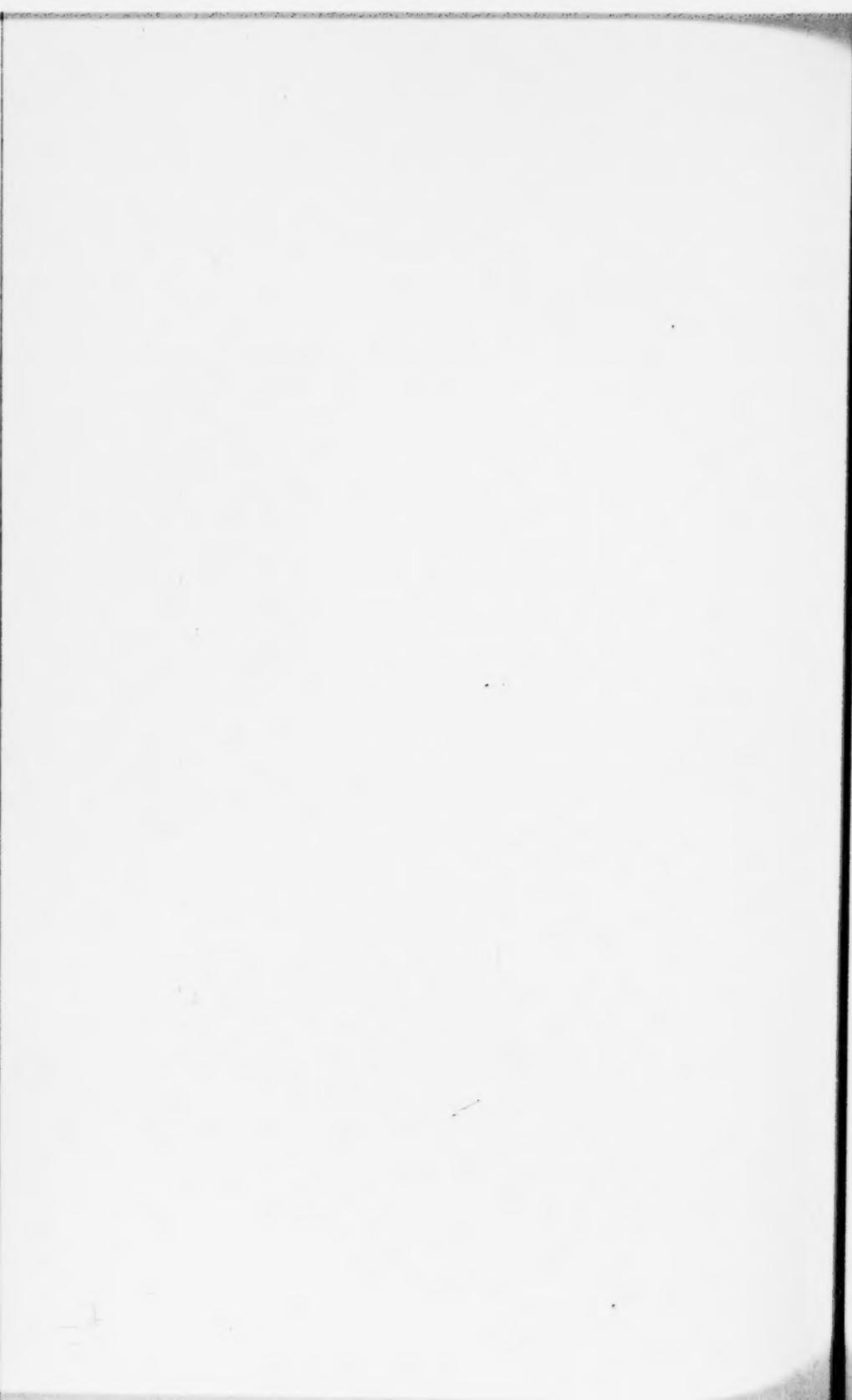
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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 120

OLAF OSWALD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE NINTH
CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 35-38) is reported in 133 F. (2d) 82, *sub nom. United States v. Metzger*.

JURISDICTION

The order sought to be reviewed was entered January 9, 1943 (R. 34-35). A petition for rehearing was denied April 5, 1943 (R. 42). The petition for a writ of certiorari was filed June 26, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the reporter of the United States District Court for the Territory of Hawaii, a salaried employee of the United States, may be compelled to furnish the Government a transcript of evidence without charge.

STATUTES AND RULE INVOLVED

Section 86 of the Act of April 30, 1900, c. 339, 31 Stat. 158, as amended (48 U. S. C. sec. 644), provides in part:

* * * The said district judges [of the district court of the Territory of Hawaii] shall appoint a reporter of said court at a salary of \$1,200 per annum.¹

R. S. sec. 1765 (5 U. S. C. sec. 70) provides:

No officer in any branch of the public service, or any other person whose salary, pay, or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law, and the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation.

¹ By other statutes, the reporter's salary was raised to \$2,600 per annum. See *Oswald v. United States*, 96 F. (2d) 10, 12 (C. C. A. 9).

Rule 80 (b) of the Federal Rules of Civil Procedure provides:

Official Stenographers. Each district court may designate one or more official court stenographers for the district and fix by rule of court the compensation which such stenographers shall be entitled to charge for their services, with provision that amounts properly paid by parties for the service of such stenographers be taxable as costs in the case in the discretion of the trial judge. The work of the stenographers shall be so arranged as to avoid delay in furnishing transcripts ordered for the purposes of motions for new trial, for amended findings, or for appeals.

STATEMENT

In 1931, petitioner was appointed official court reporter for the United States District Court for the Territory of Hawaii (R. 32). Thereafter, the Comptroller General rejected petitioner's claim for payment for a transcript of testimony furnished the United States.² In *Oswald v. United States*, 96 F. (2d) 10 (C. C. A. 9), the dismissal of a suit by which petitioner sought to recover for such services under the Tucker Act was affirmed, the court holding that petitioner was an officer of the United States and that the furnishing of transcripts to the Government was part of his offi-

² See *Oswald v. United States*, 96 F. (2d) 10, 11 (C. C. A. 9).

cial duties. Following the decision, a bill (H. R. 6779, 76th Cong., 1st sess.) to pay this claim was introduced in Congress, but no action was taken thereon (84 Cong. Rec. 6947).

In a subsequent proceeding brought by the United States to condemn land in Hawaii (R. 3), stenographic notes of the trial were taken by petitioner (R. 3-4). The Government sought to obtain a transcript of the testimony for purposes of appeal. However, petitioner refused to furnish such transcript unless paid in advance, and the district court sustained Oswald's position. (R. 16-17.) The United States thereupon petitioned the circuit court of appeals for a writ of mandamus, alleging that it was Oswald's official duty to furnish such transcript and that the United States is prohibited from making any payment therefor in addition to Oswald's annual compensation (R. 5). The petition was granted, the court holding that furnishing of the transcript was an ordinary duty of Oswald's office for which he could not claim extra compensation (R. 37).³

ARGUMENT

Unlike the situation prevailing in most federal district courts (see *Miller v. United States*, 317 U. S. 192, 197), petitioner is an officer of the

³ The Government's petition also sought relief against the district judge because of the order which had been entered sustaining Oswald's claim (R. 5). The court below found it unnecessary to consider this request (R. 38).

United States, appointed pursuant to statute and receiving a regular salary. Only two other instances are known where official positions of court reporter have been created. See 48 U. S. C. sec. 102 (United States District Court for the Territory of Alaska), and 48 U. S. C. secs. 863 and 870 (United States District Court for the District of Puerto Rico). No question of general importance is presented (cf. Pet. 5), and the decision below is clearly correct.

1. Petitioner asserts (Pet. 11-12) that his official duties were limited to taking of notes and furnishing a transcript for use of the trial judge. But as the court stated in *Oswald v. United States*, 96 F. (2d) 10, 13 (C. C. A. 9), with reference to a transcript furnished the Government:

If he were not required to furnish transcripts of testimony, there would be no purpose in having a reporter; the notes must be read or transcribed at some time to be of any value at all. The purpose in having a stenographer report proceedings in the trial of a case is to make available a transcript of the testimony whenever required. It follows, as a matter of course, that the furnishing of transcripts of testimony is an ordinary duty of an official stenographic reporter and such services rendered by him are "official services".

Petitioner does not refer to any authority, nor does he suggest any reason why his official duty, as

an employee of the United States, is limited to furnishing the court such transcripts as it might desire. Cf. *Johnson v. Ward*, 102 Miss. 464, 59 So. 806; *People v. Santiago*, 16 Puerto Rico 446. Obviously, petitioner's annual salary of \$2,600 included compensation for preparation of transcripts which the Government might require. Hence, petitioner's assertion that his property has been taken for public use without compensation (Pet. 9-10) is wholly without merit.

2. Petitioner contends (Pet. 6-9) that Rule 80 of the Federal Rules of Civil Procedure is inconsistent with Section 86 of the Act of April 30, 1900, c. 339, 31 Stat. 158 (48 U. S. C. sec. 644), providing for the appointment of an official court reporter for the Hawaiian district court, and concludes that this special statute was repealed. But, as appears from the statement of Mr. Donworth of the Advisory Committee, Rule 80 relates to the usual situation where the stenographer is not a government official. The Committee thought that a rule providing for payment of stenographers' salaries by the United States was beyond its jurisdiction and must be left to Congress. See Report of Proceedings before Institute on Federal Rules of the American Bar Association, Cleveland, pp. 354-355 (1938).

Plainly, the Act of June 19, 1934, c. 651, 48 Stat. 1064, authorizing this Court to prescribe procedural rules, did not contemplate the abolition of

an official position previously created by specific statute. This conclusion is confirmed by the fact that the Act of June 16, 1939, e. 211, 53 Stat. 841, which made the federal rules applicable to Hawaii, took the form of an addition to Section 86 of the Act of April 30, 1900 (*supra*, p. 2). There is no indication of intent to repeal any of the existing provisions of Section 86, which included the authorization to appoint a court reporter. The failure of the same Congress (76th Cong., 1st sess.) to pass H. R. 6779, by which Oswald sought to recover additional compensation for the transcript he had previously furnished to the Government, further confirms this fact. Finally, petitioner himself continued to receive his \$2,600 annual salary under the statute which he now claims was repealed.⁴

The rule⁵ of the district court in Hawaii to which petitioner makes repeated reference (Pet. 2, 7-8, 11-12) could of course not operate to compel the United States to pay extra compensation for official services, in view of R. S. sec. 1765 (*supra*, p. 2), as petitioner's "emoluments are fixed by law."

⁴ This fact does not appear in the record but has been verified by the Administrative Office of the United States Courts.

⁵ This rule is set forth in the Petition, pp. 7-8.

CONCLUSION

It is therefore respectfully submitted that the petition for writ of certiorari should be denied.

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JULY 1943.

